Nos. 83-321 and 83-322

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER, PETITIONER

v.

STATE OF GEORGIA

CLARENCE COLE, ET AL., PETITIONERS

v.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether Ga. Code § 16-14-7(f) is unconstitutional on its face in authorizing the seizure of private property incident to a lawful arrest, search, or inspection if "the officer has probable cause to believe the property is subject to forfeiture."

2. Whether the seizure of items not specified in a valid search warrant requires the suppression of items seized under the authority of the warrant.

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INTEREST OF THE UNITED STATES

The Georgia statute challenged here is closely patterned after the federal civil forfeiture statute relating to controlled substances offenses, 21 U.S.C. 881. The federal statute authorizes the warrantless seizure

of forfeitable property on the basis of probable cause, 21 U.S.C. 881(b)(4), and hence petitioners' contentions cast doubt upon its constitutionality as well. By the same token, the question of suppressing evidence seized pursuant to a valid warrant because other items were improperly seized in the course of executing the warrant arises in federal cases as well as state cases.

In addition, while this brief does not treat the issue in detail or take a position on its proper disposition in the circumstances of this case, the question presented concerning the closure to the public of the suppression hearing potentially implicates policies embodied in two federal statutes, the Classified Information Procedures Act, 18 U.S.C. App. III, at 549 *et seq.* and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. See note 14, *infra*.

STATEMENT

After a long investigation of suspected gambling operations, Georgia law enforcement officers simultaneously executed search warrants at numerous locations in early January 1982. The probable cause underlying the warrants was based largely on evidence obtained from a series of court-authorized wiretaps. The searches uncovered considerable evidence of criminal activity, and petitioners were indicted and charged with violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code §§ 16-14-1 to 16-14-15 (1982 & Cum. Supp. 1983), and other gambling statutes.

At trial, petitioners moved to suppress the evidence seized during the searches, primarily on the ground that the wiretaps were invalid. The last two paragraphs of the suppression motions also contended

that the searches and seizures were overbroad and that no seizures could be justified on the basis of Ga. Code § 16-14-7(f), which authorizes warrantless seizures of forfeitable property on the basis of probable cause, because that statute is unconstitutional on its face. See J.A. 8a-12a. At the State's request, the suppression hearing was closed to the public so as to prevent unnecessary publication of the intercepted conversations (see J.A. 13a-18a). The trial court ordered the suppression of items seized during the searches that were beyond the scope of the warrant (see J.A. 21a), but the suppression motions were denied in all other respects (J.A. 19a).[1] Thereafter, petitioners were acquitted on the RICO count but convicted on the charges of commercial gambling and communicating gambling information, in violation of Ga. Code §§ 16-12-22 and 16-12-28 (1982) (J.A. 20a).

The Georgia Supreme Court affirmed (J.A. 20a-28a). Without specifying whether any evidence had been introduced at trial that had been seized pursuant to Section 16-14-7(f), the court held that petitioners

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[1] Petitioners assert (Br. 9) that the suppression order of the district court did not extend to all of the seized items that were beyond the scope of the warrants. We have not had access to the record (other than the Joint Appendix) and thus are not in a position to address whether petitioners continued to claim after the suppression order was entered that additional items should have been suppressed as outside the scope of the warrants. We note, however, that the Georgia Supreme Court obviously was of the view that all the evidence introduced at trial was within the scope of the warrants (see J.A. 21a-22a). Significantly, petitioners' statement of the case in their brief neglects to specify any items of evidence that were seized during the searches of their premises and introduced against them at trial that should have been suppressed as outside the scope of the warrants.

had standing to challenge the constitutionality of the statute, but it rejected that challenge. The court explained that the statute merely authorized the seizure of property discovered in the course of a lawful search on the basis of probable cause to believe that it was forfeitable. Hence, the court held, "[b]y definition * * * the statute complies with the Fourth Amendment." J.A. 21a. The court also rejected petitioners' contention that the evidence lawfully seized pursuant to the search warrants and introduced at trial should be suppressed because other items were seized that were not specified in the warrants (J.A. 21a-22a). The court also upheld the trial court's decision to close the suppression hearing (J.A. 23a).

SUMMARY OF ARGUMENT

I. The seizure provision of the Georgia civil forfeiture statute, Ga. Code § 16-14-7(f) (Cum. Supp. 1983), plainly is constitutional on its face. It does not authorize any search and consequent invasion of privacy whatsoever; it permits the seizure of property on the basis of probable cause to believe that it is forfeitable. Thus, the statute simply reflects the well established rule that if police officers are lawfully present in a particular place and see an object that they have probable cause to seize, they may seize that object immediately. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). This is because the Fourth Amendment consequences of an erroneous seizure are much less severe than those of an erroneous search. There is an interference only with a possessory property interest, not a privacy interest, and thus it is not necessary to invoke the prophylactic measure of a

warrant and its advance judicial determination of probable cause in order to justify a seizure.

There is no reason why the authority to seize on the basis of probable cause should exist for evidence of a crime or stolen property, but not for forfeitable property. Indeed, this Court has recognized that an innocent object like a car may be seized without a warrant, even if totally unconnected with criminal activity. See *G.M. Leasing Corp.* v. *United States*, *supra*. It may be, as petitioners contend, that the inherently innocent nature of forfeitable property makes it more difficult to establish probable cause than in the case of evidence, but that is no basis for challenging the facial validity of the statute. In those situations where an officer does have probable cause to believe that property is forfeitable, the seizure authority conferred by the Georgia forfeiture statute plainly satisfies the Fourth Amendment. If, conversely, a seizure is made without probable cause, as petitioners suggest happened in this case, that seizure would be unlawful quite without regard to the facial validity of the statute, which does not in any event permit such a seizure. And it is clearly established that a seizure of forfeitable property by a police officer does not violate due process because of the absence of a pre-seizure hearing. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

II. The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); see also *Andresen*

v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). This general principle follows from the rule that evidence is not to be suppressed unless it is the "fruit" of an illegality. Even assuming that complete suppression could be justified in an extreme case where police officers used a narrow warrant as a pretext to conduct a general search, in effect treating it as a general warrant, the record here provides no possible basis for finding that this is such a case. Indeed, petitioners point to no evidence that the *searches* exceeded the authorization of the warrants at all; their allegations focus only on the *seizure* of items outside the scope of the warrants, which is clearly separable from the lawful seizure of other items. In short, the record before this Court provides no basis for suppressing the evidence introduced at trial that was seized in accordance with the search warrants.

ARGUMENT

I. GEORGIA'S FORFEITURE SEIZURE STATUTE IS CONSTITUTIONAL ON ITS FACE

At the outset, we note that it is far from apparent that the question of the constitutionality of the Georgia civil forfeiture statute is properly before this Court. As far as we are aware, all of the evidence introduced at trial was discovered and seized under the authority of valid search warrants or pursuant to wiretaps that are not challenged here. According to the Georgia Supreme Court (J.A. 21a), "[s]uch items as were unlawfully seized were excluded from evidence at trial." Petitioners do not specify any evidence introduced at trial that was the subject of a warrantless seizure under the Georgia forfeiture

statute.[2] Moreover, the gravamen of their complaint seems to be (*e.g.*, Pet. Br. 24-26) that numerous seizures were made that were not supported by probable cause; not only does this raise no issue of the facial validity of the statute, but it fails to implicate the statute even as applied, since the statute does not purport to allow non-probable-cause seizures. Hence, even assuming that the statute is unconstitutional, it is not clear why that should have any effect on the validity of petitioners' convictions, or why this Court would be rendering anything other than an advisory opinion were it to pass upon the issue here.

In any event, petitioners' challenge to the facial validity of Section 16-14-7(f) is groundless. The statute simply allows a law enforcement officer, "incident to a lawful arrest, search, or inspection," to seize property that he has probable cause to believe is subject to forfeiture "and will be lost or destroyed if not seized." Plainly, the statute does not purport to authorize any sort of warrantless *search*; it concerns only the *seizure* of items already discovered by officers in the course of an otherwise lawful search.[3] This type of provision is common in civil forfeiture statutes. The Georgia provision authorizing warrantless seizures on the basis of probable cause is quite

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[2] The only items that petitioners specify as seized under the authority of the civil forfeiture statute (see Br. 24 n.32) are some personal records that were apparently suppressed by the trial court (see Pet. Br. 9; J.A. 19a, 21a) and an automobile that was seized some time after the search warrants were executed and for the purposes of civil forfeiture proceedings not involved here.

[3] Petitioners assert (Br. 24 n.32) that, in light of the trial court's "refusal to pass on the validity of the search warrants," Section 16-14-7(f) must be treated as authorizing "warrant-

similar to the analogous provision in the federal civil forfeiture statute for the fruits and instrumentalities of drug transactions, 21 U.S.C. 881(b)(4), and to forfeiture statutes in almost every state in the country.[4]

A. For purposes of the warrant requirement, there is a sharp constitutional distinction between searches and seizures. Searches involve an interference with

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less entry into a person's home [and] an indiscriminate search of the premises * * *." This characterization of the authority conferred by the statute is patently absurd given the statutory language. Moreover, while we have not had an opportunity to examine the entire record in this case, the facts as revealed in the papers that have been filed make it quite clear that the trial court's action here does not evidence any approval of warrantless searches, whether pursuant to the forfeiture statute or otherwise. The motion to suppress reprinted in the Joint Appendix (at 8a-12a) raised 23 grounds for suppression, 21 of which related to the wiretaps that provided probable cause for the searches that occurred in this case. The other two grounds, including the challenge to the facial validity of the forfeiture statute, focused on the alleged overbreadth of the seizures. Thus, once the trial court decided that the wiretaps were valid (a finding that is not challenged here), it is not apparent on what grounds it could possibly have held that the search warrants were invalid. The entries and accompanying searches were authorized by valid warrants and hence constitutional. The only remaining question for the trial court would appear to have been whether the seizures were overbroad, and, as noted above, it apparently resolved that by suppressing as evidence items seized outside the scope of the warrants.

[4] The federal provision is incorporated in Section 505 of the Uniform Controlled Substances Act, 9 U.L.A. 612-613 (1979). That uniform statute has been substantially adopted by 46 states, plus the District of Columbia, Puerto Rico, and the Virgin Islands. 9 U.L.A. 187-194; *id.* at 78 (Cum. Supp. 1988).

an individual's legitimate expectations of privacy, and thus they implicate the core interest protected by the Fourth Amendment. See, *e.g.*, *Katz* v. *United States*, 389 U.S. 347 (1967). If police officers conduct a search based on their opinion that probable cause exists, and that opinion turns out to have been erroneous, the invasion of privacy has already occurred, and "the ruptured privacy of the victims' homes and effects cannot be restored." *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Because of the severe consequences in terms of Fourth Amendment values of such a miscalculation by the police, the prophylactic measure of a warrant is generally required for searches in order to interpose a judicial determination of probable cause before the intrusion occurs.

Seizures are quite different. A seizure involves no invasion of privacy; it represents rather an interference with an individual's possessory interest in a piece of property. See *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion). If a seizure turns out to be erroneous, the property can be returned, and the only injury is the deprivation of possession for a limited time. Because the Fourth Amendment consequences of an erroneous seizure are not nearly as severe as in the case of an erroneous search, it is generally reasonable to permit seizures—on the basis of probable cause—without advance authorization by a magistrate.[8]

Recognizing these important distinctions between searches and seizures, the Court has followed "the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Texas*

[8] Of course, the police officer's determination of probable cause is still subject to subsequent judicial review.

v. *Brown*, slip op. 8 (plurality opinion). See also *id.* at 2-3 (Stevens, J., concurring); *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977); but see *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 4 (dictum). Indeed, even the more intrusive seizure of a *person* (*i.e.*, an arrest), may be effected in a public place without a warrant. *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976). A warrantless seizure may occur in a public place; it may also occur in a place in which an individual has a privacy interest, but only if police officers are already lawfully on the premises and the object seized is in plain view. As long as there is no significant additional invasion of privacy, *i.e.*, if the officer is in a place that he has a right to be and no additional search is effected, the officer may seize on the basis of probable cause without a warrant. See *Texas* v. *Brown*, slip op. 3 (Stevens, J., concurring).

This connection between the warrant requirement and a privacy intrusion is reflected in several of this Court's holdings. In *G.M. Leasing Corp.* v. *United States*, *supra*, the government seized certain property of the taxpayer without a warrant in partial satisfaction of income tax assessments. The Court upheld the warrantless seizure of automobiles on the street (429 U.S. at 350-351), but struck down as violative of the Fourth Amendment the seizure of certain books and records that took place following a warrantless intrusion into the privacy of the taxpayer's offices (*id.* at 352-358). See generally *id.* at 354. Similarly, in *Payton* v. *New York*, *supra*, the Court recognized the general principle that warrantless arrests meet Fourth Amendment requirements, but

held that a warrant was required if executing the arrest would require a search of the home to find the suspect. 445 U.S. at 587-590, 598; *id.* at 603 (Blackmun, J., concurring). And in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), where the Court held that a warrant was necessary to *search* a suitcase found in an automobile, the Court explained that the police were entitled to *seize* the suitcase on the basis of probable cause pending the issuance of a warrant and, indeed, acted "commendably" (*id.* at 761) in doing so. See *id.* at 764 n.12; see also *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977).

Against this background, it is clear that the Georgia forfeiture statute is constitutional on its face. The statute does not authorize any warrantless searches. It simply reflects a rule well recognized by this Court—when the police are in a place where they have a right to be and see an item that they have probable cause to believe is seizable because it is subject to forfeiture, they may seize the item immediately without the need to obtain a warrant.

B. Indeed, it is not completely clear upon what theory petitioners base their claim of unconstitutionality (see Pet. Br. 24-28). They appear to concede that the Georgia police would have been permitted to seize *evidence* of a crime without a warrant. But, relying on *Warden* v. *Hayden*, 387 U.S. 294 (1967), petitioners contend that the statute is defective because it authorizes the warrantless seizure of property that is not "clearly incriminating" (Br. 26) and is "without a constitutionally sufficient 'nexus' to criminal behavior" (Br. 27). This unfocused objection cannot withstand analysis.

Surely petitioners are not suggesting that the statute is unconstitutional because it authorizes the seizure of items that are not "evidence" within the

meaning of *Warden* v. *Hayden*; that would mean that forfeitable property could not be seized even with a warrant. But if forfeitable property is seizable, petitioners advance no convincing reason why it may never be seized in the absence of a warrant. The extent to which property is incriminating on its face may well be relevant to the likelihood that probable cause will exist to seize it in a particular case, but it is irrelevant to whether a *warrant* is necessary to seize it, given the existence of probable cause.[6] The legislature determines what property should be taken into custody by officers of the state; given that determination, the Constitution generally prohibits the officers from seizing such property unless they have probable cause to believe that the property is of the character that the legislature has determined should be within the custody of the state. If there is probable cause to believe that the property is seizable, however, the Constitution draws no distinction depending upon the reason for the seizure, *i.e.*, whether the property is evidence of a crime, contraband, or forfeitable.

There is no logical reason why the fact that forfeitable property may not be incriminating on its face should pose a constitutional barrier to its seizure.[7] Just as other information may create prob-

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[6] This Court has clearly cautioned against confusing the strength of probable cause with the need for a warrant before invading a private area. See, *e.g.*, *Agnello* v. *United States*, 269 U.S. 20, 33 (1925).

[7] To the extent petitioners partially rest their argument on the characterization of forfeitable property as lacking a nexus to criminal activity, the factual premise is faulty. Although the statute is a civil forfeiture statute, the definition of forfeitable property is property used or derived from criminal racketeering activity. Ga. Code § 16-14-17(a) (Cum. Supp.

able cause to believe that an apparently innocent item, such as a diamond necklace, is seizable as stolen property (see Pet. Br. 27 n.39), so other information may create probable cause to believe that a diamond necklace is seizable as property subject to forfeiture. Indeed, contrary to petitioners' contention (Br. 27) that the Georgia statute "expand[s] the categories of property subject to seizure without warrant beyond those established by this Court," this Court has unequivocally held that warrantless seizures are not restricted to "clearly incriminating" property or evidence of a crime. In *G.M. Leasing*, the Court upheld the warrantless seizure of an automobile that was not in any sense connected with criminal activity; it was seized merely as an asset of a delinquent taxpayer. *A fortiori*, the Constitution must permit the warrantless seizure of property forfeitable as the proceeds of a criminal transaction.

The crux of petitioners' argument appears to be the assertion that it is difficult for the officer in the field to generate probable cause to believe that property is forfeitable (see Br. 25-26). That may well be, and it may even be that the police in this case seized property under the asserted authority of the forfeiture statute without probable cause (see Pet. Br. 25), in which case any such seizures would violate both the Constitution and the Georgia statute.[8] But that is no basis for attacking the facial validity of the

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1983). Thus, if police have probable cause to believe that property is forfeitable, they similarly have probable cause to believe that the property is " 'associate[d] * * * with criminal activity' " (Pet. Br. 25 (emphasis omitted), quoting *Texas* v. *Brown*, slip op. 10 (plurality opinion); see also *Payton* v. *New York*, 445 U.S. at 587).

[8] We do not see how this Court can assess such a fact-bound contention here, because petitioners have not even specified what evidence they seek to suppress on this ground.

statute. It cannot be denied that situations will arise where police do have probable cause to believe that property is forfeitable—for example, where they observe money change hands in a drug transaction. In such a situation, it is clear that the statutory authorization in Ga. Code § 16-14-7(f) to seize such forfeitable property without a warrant satisfies the Fourth Amendment.

C. Petitioners' brief contention (Br. 27-28) that the Georgia statute violates due process is completely misguided. This Court has unequivocally held that due process does not require a pre-seizure hearing when the government seizes items subject to forfeiture. *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars*, No. 82-1062 (May 23, 1983), slip op. 6 n.12; *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).[9] While it is theoretically possible that a due process problem could arise if a post-seizure hearing were unnecessarily delayed, petitioners make no such allegation in this case. In any event, the Georgia statute appears to provide for prompt forfeiture proceedings, and Section 16-14-7 (i) even provides that a motion to dismiss the proceeding must be acted upon within 10 days.[10]

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[9] The contention that a pre-seizure hearing is required is particularly perverse in the case of the Georgia statute, which permits a warrantless seizure only if the officer believes that the property will be "lost or destroyed if not seized"—*i.e.*, only if there are exigent circumstances that would excuse procurement of a warrant even if one were otherwise required.

[10] Under the federal statute, forfeiture proceedings must be instituted "promptly" if the property is seized on the basis of probable cause without a warrant. 21 U.S.C. 881(b). If an individual believes that his property was seized illegally, he may move immediately for return of the property under Rule 41(e), Fed. R. Crim. P.

II. EVIDENCE SEIZED PURSUANT TO VALID WARRANTS SHOULD NOT BE SUPPRESSED SIMPLY BECAUSE OTHER ITEMS NOT SPECIFIED IN THE WARRANTS WERE ALSO SEIZED

Petitioners briefly contend (Br. 29-30) that all of the evidence seized during the warrant searches should be suppressed because the officers executing the warrant also seized numerous items that were not specified in the warrant. There is no specific factual predicate for this contention,[11] and petitioners point to no findings of the trial court concerning whether, and to what extent, some of the searches and seizures were overbroad. On this record, therefore, petitioners' contention appears to be that an overbroad seizure, as a general rule, requires the suppression even of items specified in the search warrant. This contention is clearly mistaken.

The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Offices Known As 50 State Distributing Co.*, 708 F.2d 1371, 1376 (9th Cir. 1983), cert. denied, No. 83-568 (Feb. 21, 1984); *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir 1982); *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*,

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[11] Petitioners do cite (Br. 3 & n.3) a few excerpts of suppression hearing testimony stating that some items outside the scope of the warrant were seized, but it is not clear to what extent the limitations of the warrant were violated or even if these excerpts pertain to searches of *petitioners'* homes (see the last paragraph of the footnote).

560 F.2d 1127, 1134 (3d Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 696-697 (5th Cir. 1972); *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 407 U.S. 909 (1972). And this Court has implicitly recognized the correctness of these decisions. See *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). These decisions simply follow the well established principle that evidence is not to be suppressed unless it is the "fruit" of an illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Indeed, it would serve no useful purpose—and would seriously impair law enforcement while distorting the actions and judgments of law enforcement agents—to penalize an error in the execution of a warrant by suppressing not only the fruits of that erroneous act but all the evidence seized pursuant to the warrant.

Petitioners provide no relevant authority to support their contrary position. Their reliance (Br. 29) on *Stanford* v. *Texas*, 379 U.S. 476 (1965), is misplaced. In *Stanford*, the police conducted a search under the authority of an impermissibly general warrant, which presents a completely different situation from this case. Because the warrant itself was invalid, there was not even any lawful basis for the officers to enter Stanford's home. Nor in the case of a pure general warrant is there any basis for distinguishing among the items seized and classifying some as lawfully seized, because they are all seized pursuant to the same invalid authorization. Here, by contrast, it is not contested that the search warrants were valid. Thus, the officers lawfully entered onto private premises, and they were authorized to search for and seize those items specified in the warrants. There is no reason why the seizure of additional items

should invalidate those lawful seizures. If the officers had entered and executed the search warrants in an unimpeachable manner and then returned the next day to seize some items not specified in the warrants, it could not seriously be argued that the later illegal seizures would invalidate the fruits of the earlier lawful search. There is no reason to treat the situation here any differently.

Quoting *United States* v. *Heldt*, 668 F.2d at 1259, petitioners contend (Br. 29-30) that a "flagrant disregard" of the limitations of the warrant can require suppression of all the evidence seized and argue that this case meets that standard because the police did not confine their search in good faith to the objects of the warrant. Even assuming that the policies of the exclusionary rule would warrant complete suppression in an extreme case where a narrow warrant authorization is used as a pretext to conduct a general search,[12] it is clear that petitioners have not demonstrated that they are entitled to relief on that basis. Petitioners' objection to the execution of the warrants is focused almost entirely on the allegedly overbroad *seizures*; nothing cited in the record suggests that the *searches* went beyond the authorization of the war-

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[12] Even in such circumstances, it is not clear that an exception to the fruits principle of the exclusionary rule is appropriate. The purpose of the rule is deterrence; knowledge that no profit can be gained from the illegal aspects of a search should, under the hypothesis of the rule, remove the incentive for misconduct. Sometimes the deterrence fails, of course, but the costs associated with suppressing *lawfully* seized evidence have in every other context been thought to outweigh any increment in deterrence that might thereby be obtained, and it is not apparent why a different principle would apply to partially valid, but otherwise overbroad, searches or seizures.

rant.[13] Indeed, petitioners appear to complain (see Br. 3 n.3) that the searches were not extensive enough in that the officers seized entire boxes of records without first sorting through them to separate relevant from irrelevant documents. Thus, petitioners have made no showing that the police officers here used a warrant as a pretext for conducting a general search. In short, the record before this Court provides no basis for suppressing the evidence seized in accordance with the specifications of the valid search warrants.[14]

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[13] Even with respect to the seizures, it is not apparent why the seizures outside the scope of the warrant should be treated as evidence that the officers ignored the terms of the warrant. Petitioners have asserted that these seizures were grounded on the RICO statutory seizure authority (see Br. 24); if so, there is no factual basis whatsoever for asserting that the officers disregarded the limitations of the warrant.

[14] We take no position on the first question presented—whether the trial court's closure of the suppression hearing over petitioners' objection violated their Sixth Amendment right to a public trial. Insofar as petitioners attack the scope of the closure ordered in their case, their claim that it was broader than necessary in the circumstances may be well taken (although not necessarily establishing a *constitutional* violation). We are confident that federal practice would limit the scope of any closure order to that necessary to protect the confidentiality interests at stake. Our concern here, however, is that the Court give due recognition to the fact that there are circumstances in which any right of the defendant to public pretrial proceedings must give way to more weighty competing interests.

This Court has not heretofore had occasion to consider the scope of an accused's Sixth Amendment right to a public trial. Assuming that that right is close to absolute in the context of the *trial* itself (but cf. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606-607 (1982) (First Amendment right of public access to trial is not absolute); *Rovinsky* v. *McKaskle*,

722 F.2d 197, 200 (5th Cir. 1984) (dictum)), however, the right to a public *pretrial* hearing must nevertheless be of more limited dimension. Public scrutiny of the presentation of evidence and arguments at the trial implicates the constitutional protection envisaged by the Framers in a way that the public access to pretrial hearings does not. See *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 387-391 (1979). And this Court has recognized in other contexts the difference between pretrial proceedings and the trial itself with respect to the right of the accused to compel the public disclosure of information sought to be kept private. See *McCray* v. *Illinois*, 386 U.S. 300, 311-312 (1967) (informant's privilege). Hence, we submit that important state interests can justify closure (to the minimum extent necessary) of a pretrial hearing. This is particularly so where the interest weighing against public scrutiny of the proceedings is one that derives from a considered legislative policy. In the federal system, there are at least three situations that would require some accommodation of any Sixth Amendment right to public pretrial proceedings.

The Classified Information Procedures Act, 18 U.S.C. App. III, at 549 *et seq.*, establishes procedures to prevent the unnecessary disclosure of classified information in judicial proceedings. Section 6 of the Act provides that the government may request a pretrial in camera hearing to make determinations with respect to the "use, relevance, or admissibility of classified information" at trial (§ 6(a)). If the court determines that the classified information should not be disclosed, the record of the hearing is sealed (§ 6(d)). We think it clear that such a closed hearing could not conceivably violate the Sixth Amendment. See, *e.g.*, *Baker* v. *United States*, 401 F.2d 958, 978 n.91 (D.C. Cir. 1968) (recognizing that portion of suppression hearing may be closed to avoid disclosure of information affecting national security).

By the same token, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, places strict limitations on the use of evidence obtained through electronic surveillance. While conversations intercepted through lawful electronic surveillance may be introduced at trial or disclosed under other strictly limited circumstances (18 U.S.C. 2517), Section 2511(c) makes it a crime to disclose information

obtained by wiretaps not authorized by the statute. Given this statutory scheme, it has been held that a suppression hearing to determine the lawfulness of wiretaps must be closed to the public in order to prevent the disclosure of information obtained by wiretaps that might ultimately be determined to be unauthorized. *United States* v. *Cianfrani*, 573 F.2d 835, 855-857 (3d Cir. 1978); see also *United States* v. *Dorfman*, 690 F.2d 1230, 1232-1234 (7th Cir. 1982). This result clearly appears to be correct. The restrictions on disclosure contained in Title III are in the nature of a privilege designed to protect the privacy interests of those persons whose conversations have been intercepted (see generally *Gelbard* v. *United States*, 408 U.S. 41, 48-52 (1972)); it would entirely defeat the privilege if the conversations had to be disclosed to the public in the course of a proceeding to determine whether or not the privilege exists. We note in this connection that Title III would require the closure of such a hearing to the public (though only to the extent necessary to protect the confidentiality of the recorded conversations) regardless of the content of the conversations. We reject petitioners' suggestion (Br. 21-22) that, where the legislature has created such a privilege against disclosure and it is not waived by the relevant parties, the Sixth Amendment nevertheless requires as a precondition to closure of a pretrial hearing an ad hoc balancing of several factors, including the degree to which the particular conversations at issue implicate privacy interests. Where in camera review is otherwise indicated, the possibly suppressible wiretap evidence should not be publicly disclosed on the basis of a finding that the conversations involved do not implicate a significant privacy interest.

Another situation in which closure of pretrial proceedings would plainly be justified is when grand jury materials have been disclosed to the defense for the purpose of considering a motion to dismiss the indictment because of irregularities in the grand jury proceedings. See Fed. R. Crim. P. 6(e)(3)(C)(ii). Such motions may sometimes require hearings at which testimony and arguments would disclose matters occurring before the grand jury. The Rule provides that any disclosure of grand jury material for these purposes "shall be made in such manner, at such time, and under such conditions as the court may direct," which surely embraces the power

CONCLUSION

With respect to questions 2 and 3 presented by petitioners, the judgment of the Supreme Court of Georgia should be affirmed. Alternatively, because of the state of the record, the writ should be dismissed as improvidently granted with respect to these questions, or the case remanded for development of an adequate record.

Respectfully submitted.

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to exclude the public from any such hearing in order to avoid dissemination of confidential materials beyond the extent necessary to the court's consideration and disposition of the motion.

Finally, we note that petitioners' brief does not address the question of the proper remedy if a Sixth Amendment violation is found. In our view, the general rule that the remedy should be tailored to the violation (see, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361 (1981)) clearly demonstrates that a new trial is not an appropriate remedy. There is no allegation that petitioners' trial on the merits was not "public" as required by the Constitution; at most petitioners should be entitled to a new, public, suppression hearing. Unless that suppression hearing reaches a different result from the first one, there is no basis for vacating their convictions and ordering a new trial.

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